

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: NATIONAL)
PRESCRIPTION)
OPIATE LITIGATION,) Judge Polster
) Cleveland, Ohio
Plaintiff,)
) Civil Action
APPLIES TO ALL CASES) Number 1:17MD02804
)
)

- - - - -
TRANSCRIPT OF PROCEEDINGS HAD BEFORE

THE HONORABLE DAN AARON POLSTER

JUDGE OF SAID COURT,

ON TUESDAY, AUGUST 6, 2019
- - - - -

Official Court Reporter: Shirle M. Perkins, RDR, CRR
U.S. District Court
801 West Superior, #7-189
Cleveland, OH 44113-1829
(216) 357-7106

Proceedings recorded by mechanical stenography; transcript
produced by computer-aided transcription.

1 APPEARANCES:

2 For the Plaintiffs:

PETER WEINBERGER, ESQ.,
Spangenberg, Shibley &
3 Liber
Suite 1700
4 1001 Lakeside Avenue, E
Cleveland, OH 44114
5 (216) 696-3232

6 Also Present:

7 Jenny Lee Anderson, Esq.,
Jonathan Blanton, Esq.,
8 Mark Cheffo, Esq.,
Jayne Conroy, Esq.,
9 Sam Issacharoff, Professor
Robert Klonoff, Esq.,
10 Mark Lynch, Esq.,
Christopher Seeger, Esq.,
11 Paul Singer, Esq.,
Sonya Winner, Esq.
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 TUESDAY SESSION, AUGUST 6, 2019, AT 9:38 A.M.

2 THE COURT: All right.

3 This is obviously Case 1:17MD2804, the National Opioid
4 MDL.

10:03:03 5 This is a hearing on Plaintiff's Renewed and Amended
6 Notice of Motion, the Motion for Class Certification of Rule
7 23(b) (3), Cities/Counties Negotiation Class. So shorthand,
8 this is motion for certification of the negotiation. It was
9 filed July 9th.

10:03:28 10 There's been a number of objections filed. There were
11 responses. The Court has reviewed them all carefully. I
12 set today for hearing. I will listen to anyone who wants to
13 address the Court. My plan is then to take the matter under
14 advisement. I certainly will listen carefully to what was
10:03:53 15 said and to issue a decision shortly.

16 My request in oral arguments is for the lawyers to
17 address what they feel the best arguments that have been
18 made by those fine lawyers on the other side. That would be
19 most helpful to the Court.

10:04:11 20 I want to say at the outset that a whole lot of work
21 has gone into this. I believe the initial idea was
22 Professor, Special Master McGovern, Francis McGovern, and
23 then a number of other very fine, knowledgeable, experienced
24 people have weighed in to create and develop this. I know
10:04:43 25 Professor Issacharoff and Rubenstein had a lot to do with

1 it, a lot of fine lawyers did, people who know a lot more
2 than I do about class action litigation.

3 I have already determined that no lawyer who is also
4 representing a state, state or states, in this MDL will be
10:05:08 5 permitted to argue on behalf of the motion to conditionally
6 certify nor file any pleadings relative to that. I think
7 those lawyers have a conflict at the moment because all or
8 most of the State Attorneys General are opposing this
9 motion. So we'll have only lawyers arguing for the
10:05:35 10 proponents who are not representing states.

11 I also want to say that if I grant the motion for
12 certification, my plan is to appoint a neutral to represent
13 the non-litigating cities and counties. I think that's a
14 good idea. They're not formally -- obviously, they're not
10:05:58 15 parties to any litigation because they haven't filed but
16 they are potential beneficiaries and class members. So I
17 think it'll be appropriate to appoint a neutral to represent
18 them, and that's what I'll do.

19 Also I want everyone to know that if I do grant the
10:06:17 20 motion and class certification, I'm going to limit -- limit
21 the claims and the parties based on the short form complaint
22 in the Summit County case. So it will encompass a small
23 number of federal claims, not state claims. I think it will
24 be unruly and unworkable to have, you know, state claims
10:06:44 25 from 50 states. And I will limit it to 13 nationwide

1 defendant families. I think that's the appropriate thing to
2 do.

3 So I have a number of other -- other comments,
4 observations, but I think I'll reserve those to the end
10:07:05 5 after I hear from the parties.

6 So I think it makes sense to have the counsel for the
7 moving parties start. So who -- who's planning on
8 addressing the Court?

9 MR. WEINBERGER: Your Honor, on behalf of the
10:07:18 10 Plaintiffs Executive Committee, this is Peter Weinberger,
11 and I'm simply going to introduce our proposed co-lead class
12 counsel, who will address the Court; Chris Seeger and Jayne
13 Conroy, and I know that there -- there are others who
14 have -- with whom we have consulted and who have worked on
10:07:39 15 this, who may be called upon to answer questions or make
16 presentations.

17 Thank you, your Honor.

18 THE COURT: Okay.

19 So Mr. Seeger or Ms. Conroy.

10:07:49 20 MR. SEEGER: Good morning, your Honor.

21 THE COURT: Yes. And it's important to stay
22 seated. I know it's customary to stand, but the microphones
23 won't work as well. So everyone can stay seated.

24 MR. SEEGER: You anticipated the first
10:08:02 25 question I was going to ask. Well, thank you for that, your

1 Honor.

2 Also I want to make sure you know Sam Issacharoff is
3 here at counsel table, Bob Klonoff, who has also assisted
4 the PEC, the Professor from Portland, Oregon, is here
10:08:14 5 assisting and can also answer questions. And I intend to
6 draw upon their help today if that's okay with you.

7 I'd also like to quickly mention, you had mentioned
8 the people that put a lot of work into this. There are two
9 lawyers in particular I'd like to call out who put a
10:08:29 10 tremendous amount of work into this; Elizabeth Cabraser and
11 Paul Geller, who were there from the very beginning in terms
12 of the concepts, drafting the briefs and research, and I
13 want to thank them for their help today.

14 I thought I would start, your Honor, with just sort of
10:08:44 15 a brief overview of what we're seeking and what we're not
16 seeking.

17 I didn't intend at this point to run through Rule
18 23(a) and (b) (3) factors unless --

19 THE COURT: No. All counsel should expect
10:08:55 20 that I have carefully read all the papers, the objections.
21 I'm not expert in class action, but I understand enough to
22 decide this. And what I really want you to really focus on
23 is what you think are the strongest arguments that -- that
24 those who have filed opposition have made, Mr. Seeger. That
10:09:17 25 will help me crystallize my decision.

1 MR. SEEGER: So, your Honor, to answer that,
2 and I'll go into sort of where -- I think that duck tails
3 nicely into where I was heading.

4 Frankly, I don't think any strong arguments have been
10:09:29 5 made. The arguments regarding commonality and typicality
6 and predominance, I say it as respectfully as I can, border
7 on frivolous simply because there really can be no question
8 that those factors, those important factors of Rule 23 have
9 been met. The claims are the same, many of the facts are
10:09:48 10 the same.

11 And I guess the best example that highlights this is
12 that there's probably nobody in this courtroom that can
13 dispute this, and that is if you took the two Bellwether
14 plaintiffs out of the trial that you have upcoming, your
10:10:00 15 Honor, and you substitute them with any two other plaintiffs
16 that have a case in front of you, you're going to try the
17 exact same case. It will be the same evidence, it'll be the
18 same experts, and it's all -- so I really -- when you say to
19 highlight, what I thought I would do is highlight some
10:10:16 20 things I think are important and then let the objectors go
21 because maybe we misunderstand their objections because they
22 seem pretty weak. And there's no basis that's been provided
23 for not certifying a Negotiation Class on behalf of the
24 30,000 political subdivisions in the U.S.

10:10:32 25 So just to get to -- I'm only going to take a minute

1 or two -- what this is and what it isn't, this is simply a
2 tool to assist in the global resolution of some, most, or
3 maybe all of this litigation. Like Rule 23 has been out
4 there, nonclass aggregate settlements are out there. What
10:10:51 5 have been pejoratively, I think, referred to as inventory
6 settlements. Plaintiffs lawyers on both sides know how to
7 settle cases but this will put one more tool in the tool
8 shed.

9 Now what it isn't is it isn't forcing any Defendant to
10:11:03 10 participate in it. If a Defendant in this courtroom has no
11 interest in a class action settlement, so be it. They can
12 go the route of a Vioxx settlement, non-class aggregate
13 settlement. They can do that. I have never heard your
14 Honor express a preference one way or another and so that is
10:11:19 15 still available to them.

16 And as we all know from people who do this kind of
17 work, there is no one-size-fits-all solution to every MDL.
18 Every single MDL presents its own problems. So, your Honor,
19 as you know, I'm involved with Joe Rice and others and have
10:11:34 20 some input on the negotiating committee, and two big
21 questions and problems continue to come up over and over
22 again. The that question gets asked by the Defendants, "Are
23 you unified? Do you speak on behalf of all the political
24 subdivisions out there," and "if we settle with you, can we
10:11:49 25 get closure?" Well this, what we propose to you today,

1 answers those two questions if they want it.

2 Now the other thing I'd like point out about this is
3 that this is a major improvement over the typical Rule 23(e)
4 settlement that probably your Honor has seen and most people
10:12:05 5 in this courtroom.

6 If you take a typical consumer case, your Honor, the
7 lawyers negotiate a settlement agreement, it's presented
8 through notice, and they're asked whether they accept it or
9 they don't accept it. What we're doing here, which is very
10:12:18 10 different, is very smart people got together, led by Joe
11 Rice and his firm, and put together an allocation model
12 which distributes money potentially to the areas of the
13 country hardest hit.

14 Now more than that, there's a calculator that's
10:12:33 15 available on a website. So every political subdivision in
16 the country -- and they're all watching this case. They're
17 all aware of it -- can go to that calculator and determine
18 exactly what they would get from a hypothetical number.
19 Plug in any number you want, one billion, two billion, \$100
10:12:52 20 billion, and they can figure out what they get now. And
21 maybe the most important feature is it really turns this
22 case, if you want this tool, into a participatory class
23 action in the sense that the Class gets to vote yes or no
24 for the deal by 75 percent super majority.

10:13:07 25 So when -- I start out with that introduction because

1 when you look at it in that light, and it is voluntary,
2 there is no decent basis for objecting to this or denying
3 it, your Honor, respectfully.

4 Sam, I don't know whether you want to add anything to
10:13:24 5 that.

6 MR. ISSACHAROFF: Your Honor, I just want to
7 focus on one feature of this, which is the role of the Court
8 at this point in the proceedings, as your Honor well knows,
9 is the protection of absent class members, is to make sure
10:13:37 10 that if a class is certified, there is adequacy of the
11 representation and the various due process considerations
12 identified by the Supreme Court in cases like Amchem and
13 Ortiz are satisfied.

14 Here, we have something quite extraordinary because
10:13:55 15 the -- as Mr. Seeger just mentioned, one of the features of
16 this is that there is a table that distributes or allocates
17 the funds if they come in, so that every class member is
18 aware right now, today, of what it will get if there is a
19 settlement. And we have examples in the brief. A \$1
10:14:17 20 billion settlement, Cuyahoga County will get so much, Summit
21 County will get so much. And the important and critical
22 issue is that that is known ahead of time what the
23 distribution is, how each class member will be treated
24 relative to each other class member, the obligation that the
10:14:37 25 similarly-situated is treated in similar fashion. And there

1 have been effectively no objections from the Class as to the
2 distribution, the allocation formula we have. This is
3 unheard of because the amounts are known, how one does
4 relative to another is known, and no objection.

10:14:58 5 We have a voting process that is novel in some sense
6 in its use in the Class action. As the Court is well aware,
7 we've taken it from other places, from 524(g) of the
8 Bankruptcy Code, which has a similar type of voting
9 structure, from an American Law Institute proposal, which
10:15:17 10 expanded that into other kinds of aggregate litigation.

11 And here, we give the voting distributions so that
12 it's a very simple process. Every class member just says
13 yes or no. There's no complication to it but it's tabulated
14 in six different ways to make sure that there is no
10:15:37 15 crammed-down mechanism. 75 percent cut-offs at each of the
16 six different voting groups has to be satisfied in order for
17 this to go forward.

18 Again, no objection from within the Class. I know
19 that there's six counties -- six cities in Ohio, now seven,
10:15:56 20 that have some objections that they want to raise, but
21 effectively, out of 33,000, there have been effectively no
22 objections, as we said in the brief. It's over 99.98
23 percent. We're in the Ivory Soap category of purity on
24 class representation here.

10:16:17 25 And so at this point, what are the objections, or who

1 is objecting? There are Defendants who are claiming that
2 this is poor representation. There's add -- it's not
3 adequacy, not typicality. There's a certain crocodile-tear
4 quality to Defendants trying to stop the Class from getting
10:16:38 5 what it wants in the name of the sanctity of the Class'
6 interests. That's always a bizarre situation in court. But
7 putting that aside, this is a group of Class members who
8 have lawyers. We have the lawyers here for several of the
9 Class members who are serving as -- have been offered a
10:16:59 10 subclass counsel. These are political entities who are
11 accustomed to making decisions based on the information
12 available to them. They got into office through the
13 elective process.

14 So the idea of voting and being part of a political
10:17:16 15 constituency is by no means alien to them. We are not
16 taking a class of minors. We are not taking a class of
17 consumers who bought a \$20 toaster or something and have no
18 knowledge that they are a member of a punitive class. Here,
19 we have self-conscious political leadership of every
10:17:36 20 City/County in the United States, and what's critical for, I
21 think for the Court's purposes, is there's no objection.
22 There's no objection meaningfully from within the Class.
23 And that is the first and most critical threshold that the
24 Court has to pay attention to, in my view.

10:17:55 25 The only other point we can get to is the relationship

1 with the states and that's, as the Court has already
2 indicated in its ruling on who can speak today and who
3 cannot, that is a source of concern. And we would just say
4 the following:

10:18:12 5 There is no proposal here to alter relations between
6 states and counties, states and cities. There is no
7 proposed change of state law. We are not asking the Court
8 to issue any orders that change the relationship between a
9 state and its political subdivisions.

10:18:30 10 If a state has authority to step into the shoes of the
11 cities and counties in its state and say this is what we
12 want, X or Y in litigation or non-litigation, so be it.
13 There's nothing here that alters that. If they do not have
14 that authority, which is true, which we know to be true in
10:18:48 15 some states, or if they do not wish to exercise that
16 authority and wish the cities and counties to pursue, as
17 aggressively as possible, the claims that they may have,
18 then this is a vehicle that helps achieve that.

19 Finally, with regard to the claim by the Defendants
10:19:06 20 that -- and the claims are curious because the same
21 distributor and pharmacy Defendants both say this is too
22 empowering of the Class, and this is a terrible idea, and it
23 can never be realized because 75 percent is too high a
24 threshold. There's some ambiguity in which way they want to
10:19:29 25 go on that, but in regards to their claim they are

1 prejudiced, which is ultimately the issue they have to
2 answer, how were they harmed legally, the answer is quite
3 simple. If they don't like this, ignore us. The moment, if
4 this court certifies, the moment the certification takes
10:19:45 5 place, every single Defendant is as free as it was before to
6 simply ignore us. Don't pay any attention to us. You want
7 to go to trial, go to trial. Good luck. Have at it. You
8 want to settle some other mechanism, fine. You want to --
9 you want to attempt an aggregate settlement, a bankruptcy
10:20:06 10 solution, what have you, it doesn't matter. You are as free
11 as before.

12 What is being proposed to the Court, as Mr. Seeger
13 said, is a tool, it's a novel one we admit, but it's in
14 keeping with the idea of Rule 23 as a mechanism for complete
10:20:22 15 resolution of common legal problems, and we believe that
16 this advances that.

17 THE COURT: Okay. Thank you, Professor
18 Issacharoff and Mr. Seeger.

19 Anyone else want to say anything from the moving
10:20:40 20 proponent side at this point? All right. Thank you.

21 Then is there anyone who'd like to speak from the
22 opponent or objector's side and --

23 MR. FERRARO: Yes, your Honor.

24 I'm Jim Ferraro from Kelly and Ferraro, and we filed
10:21:05 25 an objection on the Plaintiff's side on behalf of the

1 handful of Ohio cities. Okay.

2 The prior brief made reference to our objections as
3 odd and relevant, but by way of background, I tell you where
4 we've been. Okay. I was an objector in the Amchem case
10:21:27 5 from the very beginning all the way through the Supreme
6 Court over 20 plus years ago. I've been involved with over
7 20, 524(g) asbestos trusts, and they have no relationship to
8 this particular matter.

9 We represent proposed members of this negotiating
10:21:44 10 Class. We also represent third-party claims that are not
11 part of negotiating class. We represent a rather large case
12 that's not part of the negotiating class and recovery for
13 the state of Florida, which is here in the Northern District
14 of Ohio now and in recovery services --

10:22:01 15 THE COURT: Slow down. Who exactly are you
16 representing, sir?

17 MR. FERRARO: We're objecting on behalf of a
18 handful of Ohio cities.

19 THE COURT: All right. Which cities are
10:22:12 20 you -- are the litigating cities or non-litigating cities?

21 MR. FERRARO: Litigating cities.

22 THE COURT: Which cities?

23 MR. FERRARO: One is East Cleveland.

24 THE COURT: And what other cities do you
10:22:23 25 represent?

1 MR. FERRARO: I know I don't have the list in
2 front of me but it's six.

3 THE COURT: All right.

4 MR. FERRARO: And --

10:22:29 5 THE COURT: You mentioned Florida and I didn't
6 -- wasn't following you. I thought you were representing
7 Ohio -- you're objecting on behalf of six -- seven Ohio
8 cities?

9 MR. FERRARO: I have the list, by the way.

10:22:39 10 It's the City of North Royalton, Ohio. I mentioned
11 the City of East Cleveland, the City of Mayfield Heights,
12 City of Lyndhurst, City of Huron, the City of Wick -- life.

13 THE COURT: Wickliffe.

14 MR. FERRARO: Wickliffe. Thank you, your
10:22:54 15 Honor.

16 And the other Class is talking about the Florida class
17 was moved up here, is MSP Recovery. They're the -- they're
18 the assignees of MSP Recovery for Medicaid. There was also
19 a national class action that was filed right here. Same
10:23:09 20 type of case, it's on behalf of Medicaid Recovery Benefits.
21 They're the assignee from a number of insurance carriers in
22 the United States. It's a rather substantial case. It may
23 be bigger than any city/municipality in this litigation.

24 THE COURT: I don't see how that -- how that
10:23:27 25 even applies. I mean they're not part of this potential

1 Class.

2 MR. FERRARO: I agree with that, and I made
3 reference, your Honor, to the fact I represent them.

4 THE COURT: All right.

10:23:36 5 MR. FERRARO: We're here on behalf of the City
6 Classes.

7 THE COURT: Tell me specifically what -- what
8 is the objection for these seven Ohio cities; East
9 Cleveland, et al.

10:23:45 10 MR. FERRARO: Here's the objection. It's
11 based on the facts, okay, that there's 1200 lawsuits
12 pending, the proposed negotiating class is 33,000 class
13 members.

14 Over 30,000 have filed nothing in this litigation.
10:23:59 15 Zero.

16 THE COURT: All right.

17 MR. FERRARO: In the papers, your Honor, it
18 states at Page 8 in the motion, no uncertain terms, that the
19 voting process is straight forward. Each Class member will
10:24:10 20 vote only once. The vote is simply yes or no in favor of or
21 against the proposed settlement. That's not true. That's
22 not the way the rule works that each Class member will vote
23 only once. The reality is the overwhelming may never vote.
24 There may be zero votes. And if you don't vote, you're in.
10:24:28 25 And where does that leave you if you're in? Okay.

1 THE COURT: Well, I'm not following you at
2 all, sir.

3 Everyone can -- everyone will be given an opportunity
4 to vote. If someone chooses not to vote, they choose not to
10:24:40 5 vote like in the election. You have the opportunity to
6 vote.

7 MR. FERRARO: Here's the problem. If you
8 don't opt out, if you don't opt out based on the data we
9 have now, okay, there is absolutely no monetary component to
10:24:53 10 this as it stands.

11 We have the three factors. How many people died in
12 your city, how many opiate -- how many milligrams of opiates
13 went to the County, so forth. No monetary component. Sure,
14 you go to the website, you could be some county from
10:25:07 15 wherever city, municipality, look it up and say my
16 percentage is .0021 percent of what? Right now it's zero.
17 Zero is zero or it could be a big county, maybe a .001
18 percent, or 01 percent of zero is zero. The problem that I
19 have is three fold.

10:25:28 20 THE COURT: Well, that's not an objection. I
21 mean, of course, it's zero. It only goes into effect if
22 there is a settlement, which will be not zero but some
23 amount of money.

24 MR. FERRARO: That's correct, but it's a blind
10:25:41 25 settlement, your Honor.

1 For instance, say East Cleveland does not opt out,
2 okay, and supposed to be, I guess, within 60 days, now
3 you're in. You're in.

4 THE COURT: Right.

10:25:51 5 MR. FERRARO: You don't know what the numbers
6 are. Say negotiate for the next six months and come up with
7 a number, and if you -- if the 75 percent vote occurs,
8 you're in. You don't have a choice. You can't get out at
9 that point. There's no way out. There's no way out. You
10:26:07 10 don't know if it's a zero or \$100 billion. You don't know
11 that. That is a glaring deficiency.

12 THE COURT: No. There would still be a vote
13 on the settlement itself. What you're accepting is the
14 allocation model.

10:26:20 15 MR. FERRARO: You're right, 75 percent vote,
16 but if you didn't opt out, you were bound by that vote.

17 THE COURT: Right.

18 MR. FERRARO: I know but --

19 THE COURT: You can opt out if East Cleveland
10:26:30 20 looks at this and says, "Hey, I don't like this. I don't
21 like this even this very thoughtful way of allocation" --

22 MR. FERRARO: They can opt out. They can opt
23 out, you know. They can opt out blindly right now. Why not
24 let them opt out without the blinders? Why don't we do it
10:26:46 25 like most single opt-out cases?

1 THE COURT: All right. Okay. I -- your
2 objection -- I understand the objection.

3 MR. FERRARO: So that's Part 1. You don't opt
4 out, you're in. Okay. If the 75 percent, you can vote
10:27:01 5 against the 75 percent vote, but still be bound by it if it
6 passes. So that's something that is a very problem -- but
7 at a minimum, at a minimum, the way this should work, it
8 should be at best an opt-in class. There's no problem
9 notifying the 33,000 municipalities, townships, and the like
10:27:22 10 of a --

11 THE COURT: Have all seven of these cities
12 filed lawsuits?

13 MR. FERRARO: I'm sorry?

14 THE COURT: Have all seven of the Ohio cities
10:27:30 15 you represent --

16 MR. FERRARO: Yes.

17 THE COURT: So you need to understand that
18 you've got, you know, seven that oppose this and the other
19 2000 seem to think it's fine. So we're in a very tiny
10:27:44 20 minority, but maybe you're right. So you need to recognize
21 that.

22 MR. FERRARO: Another problem with that, your
23 Honor, I will tell you that. And it's in the reply brief.
24 They say we represent, these seven cities or six cities that
10:27:53 25 I mentioned, represent .02 percent. I get that. And they

1 say of the thousands of public entities in the proposed
2 class, none has taken issue. Of course, they haven't taken
3 issue because they didn't get notified of this. They don't
4 know of this, know about this. The last time I looked at
10:28:10 5 the certificate of services case, I didn't see 33,000 --

6 THE COURT: I referred not to the 33. I
7 referred to the -- let's do the sub group. You're in a
8 litigating, represent seven litigating cities. Out of 2000
9 litigating cities, I certainly know all this because the
10:28:27 10 lawyers help negotiate it and they're in the case and they
11 got notice. So I'm just pointing out that there are roughly
12 2000 litigating cities that appear to have no objection to
13 this. There's seven who do. All right. But, those are the
14 facts.

10:28:41 15 MR. FERRARO: You look at the fraction, which
16 is it's less than 2000 but a small fraction of the 33,000
17 that may go into this blind settlement or be bound by --

18 THE COURT: You don't represent any of those,
19 do you?

10:28:54 20 MR. FERRARO: Other than my seven, no, I am
21 not.

22 THE COURT: Okay. So I don't think you have
23 standing to raise an objection on behalf of the other 30,000
24 cities and counties.

10:29:04 25 MR. FERRARO: All right. I mean we're going

1 to object and we'll take it to wherever it goes from here.
2 If we get -- if that's the way it goes, that's the way it
3 goes. I mean that we're basically voting right now.

4 THE COURT: I'm just making an observation
10:29:18 5 that you appear to be raising an objection on behalf of
6 cities and counties you don't represent. So I don't -- I
7 just made that observation.

8 MR. FERRARO: As an objector, we -- and as a
9 lawyer, I think it's wise to put out there that for parties,
10:29:37 10 municipalities that aren't here and didn't get notice of
11 today's hearing, we don't know what they would say. We're
12 speculating. Now, of course, the small group --

13 THE COURT: Well, they will be notified if
14 I -- if I send out this -- if I certify this class, they
10:29:50 15 will be notified --

16 MR. FERRARO: Right.

17 THE COURT: -- next 60 days, and they will
18 have an opportunity to vote. Absolutely. They will be
19 notified, those elected officials representing them will
10:30:00 20 know, and they can -- they will have the opportunity to
21 weigh in, one way or another.

22 MR. FERRARO: I agree. But it's still a blind
23 vote because there's no monetary component. That's the
24 systemic problem with what we're doing here. It should be
10:30:14 25 an opt-in Class, or at best or at worse --

1 THE COURT: Okay. I understand. I read your
2 papers, sir. I understand your objection.

3 MR. FERRARO: Okay.

4 That would be the substance of the objection, is that
10:30:28 5 this is three-fold.

6 By the way, there's a third factor that we may be
7 bringing parties into this litigation through the opt-out
8 Class that may be blind and may be wasting funds that could
9 go to the real parties and interests, the ones that have
10:30:43 10 filed cases that do have damages, and the model may be
11 correct or may not be correct. That's -- is that -- is that
12 a --

13 THE COURT: Wait a minute. Are you -- are you
14 saying that that 30,000 cities and counties who have not
10:31:00 15 filed lawsuits should be ignored?

16 MR. FERRARO: No. I think that they should be
17 noticed. First of all, they should have been noticed about
18 today, Number 1, and Number 2, before they go into a final
19 settlement, second opt-out where you get presented -- like
10:31:16 20 literally, every single case I looked at where there's a
21 single opt-out, no second opt-out, they have the monetary
22 component. It's a full settlement. It's like the 524(g),
23 you have everything in front of you. You know the number,
24 you know what you're voting on, you know what you're going
10:31:30 25 to get.

1 THE COURT: All right.

2 MR. FERRARO: We don't know that here. We
3 don't -- simply don't know that.

4 So my suggestion is that the Court, at a minimum, have
10:31:39 5 a second opt-out after the financial component is out there.
6 And the best scenario should be an opt-in Class. It's easy
7 to notify the 33,000 of an opt-in Class and get a full vote
8 and see how fair it is.

9 And the other objection is these adopted from 524(g),
10:31:56 10 where it's the 75 percent of who votes. Okay. So depends
11 on how many of these entities vote. Maybe ten will vote,
12 maybe 30,000 will vote, maybe four will vote, maybe three
13 out of four wins. Who knows?

14 THE COURT: Well, sir, that's always an issue.
10:32:12 15 In any election I know, it's very often determined by who
16 chooses to vote and who doesn't.

17 MR. FERRARO: Right. I understand that but
18 that's --

19 THE COURT: That's always the case in an
10:32:23 20 election. No one has a gun to anyone's head in this
21 country. That's the point of free election.

22 MR. FERRARO: Right, but again --

23 THE COURT: Or you cannot vote.

24 MR. FERRARO: Again, the blindness of the
10:32:32 25 settlement is the biggest issue.

1 And the other is I'm not here on behalf of Attorneys
2 General. I don't represent them. But if you want to get to
3 the 33,000, maybe that's a better way through 15 Attorneys
4 General who control the counties and cities, municipalities
10:32:47 5 in their respective states.

6 THE COURT: I'm not following that. I
7 understand your objection, sir.

8 MR. FERRARO: Okay. Okay.

9 THE COURT: Thank you.

10:32:56 10 MR. FERRARO: You're welcome.

11 THE COURT: Okay.

12 Is there anyone else who wants to speak for any of the
13 opponents to the motion?

14 MR. LYNCH: Your Honor, Mark Lynch for
10:33:10 15 McKesson. I'd like to introduce my partner, Sonya Winner,
16 who will address the objections of the distributors.

17 THE COURT: I should indicate the distributors
18 filed collective objections.

19 Okay. Ms. Winters.

10:33:21 20 MS. WINNER: It's Winner, your Honor.

21 THE COURT: Sorry.

22 MS. WINNER: Thank you, your Honor.

23 Your Honor, this is a very unusual kind of opposition.
24 It's not like the usual situation where Defendants are
10:33:34 25 opposing class certification. I am not here today because

1 Defendants are unalterably opposed to pursuing anything that
2 would offer a legitimate mechanism for pursuing global
3 resolution of this litigation.

4 I'm here because the Defendants who oppose this motion
10:33:56 5 believe that the opportunity for global resolution that this
6 motion purports to offer is a mirage.

7 For any class to be a reliable counterparty the
8 Defendants can negotiate with for settlement, the Defendants
9 would need comfort that any settlement that they reached
10:34:19 10 with that class would survive, would survive objections,
11 would survive any subsequent appeals.

12 So when we look at this, we don't just look at how we
13 would object to this class. We must also look at how absent
14 Class members would object to this Class and would pursue
10:34:43 15 appeals of approval of any settlement with this Class. That
16 is -- that is the framework that we have to focus on.

17 THE COURT: There wouldn't be any absent class
18 members.

19 MS. WINNER: There are absent Class members.
10:34:56 20 Anybody -- absent Class members are the members of the
21 Class, whether you use the word absent or not. Anybody who
22 doesn't opt out is going to be bound by the settlement. If
23 it's --

24 THE COURT: They're not -- they're not absent
10:35:12 25 they're in.

1 MS. WINNER: They're in. I'm sorry. Absent
2 class members is a term sometimes used to refer to the Class
3 members who aren't named plaintiffs. That's all I meant by
4 that term. I'm sorry if I was confusing.

10:35:23 5 The problem is that this proposal does not provide the
6 assurances of a valid viable settlement that the Defendants
7 would need. And Defendants are concerned --

8 THE COURT: Well, you may be right, Ms.
9 Winner, but no Defendant has to -- Number 1, no Defendant
10:35:50 10 has to settle, period, under any model. Okay?

11 MS. WINNER: Of course.

12 THE COURT: You can go to trial, win or lose.
13 If you lose, you can appeal and you can try 2000 cases, plus
14 the several hundred in State Court, so-called 2500 trials.
10:36:07 15 Any Defendant can choose the 2500 trials.

16 Second, any Defendant that doesn't like this model and
17 wants to pursue settlement can develop any other model.

18 MS. WINNER: I understand.

19 THE COURT: And use it -- and use it. And if
10:36:23 20 you think this model isn't -- doesn't -- if your client
21 wishes to pursue resolution and doesn't think this is a good
22 model, then more power to you. You can come up with another
23 model.

24 And I understand other models have been proposed in
10:36:41 25 settlement discussions. I'm not going to discuss them

1 because they're private. But I understand other models have
2 been discussed, floated, and that's fine. No one has a
3 monopoly on good ideas. I think the more good ideas
4 floated, all the better.

10:36:59 5 And so I just want to point that out that if your
6 client doesn't like this model and doesn't think it provides
7 certainty and wouldn't -- and would not be upheld on appeal
8 if there are objectors, then you come up with a better model
9 or -- or take this model and say this is not a bad model how
10:37:27 10 it goes, but I want to change this, this, and this to make
11 it better and use that.

12 MS. WINNER: Well, your Honor, I fully
13 appreciate what you've said, and you're, of course, right.
14 But Defendants are concerned that certification of this
10:37:43 15 Class, nonetheless, creates real -- would create real
16 problems here.

17 THE COURT: That's what I'd like -- what
18 problem?

19 MS. WINNER: The problems it would create
10:37:55 20 would include for, one thing, it would take up the resources
21 of this Court and of the Special Masters on a process that
22 we believe at the end of the day would not be viable.
23 Second --

24 THE COURT: All right.
10:38:08 25 But, it wouldn't be your resources, okay, your

1 client's resources. I appreciate that you're mindful of
2 mine and I'm glad that you are, and I -- but if -- if a
3 defendant who you're not representing disagrees with you and
4 thinks this is a pretty good model and wants to pursue it,
10:38:32 5 why shouldn't they be allowed to pursue it?

6 MS. WINNER: Your Honor, I would point out
7 although not all Defendants have affirmatively opposed this,
8 there's no Defendant that has come out affirmatively in
9 support of it.

10:38:45 10 THE COURT: I didn't ask for that. I mean,
11 you know, that's -- they don't -- I didn't -- I didn't
12 require Defendants to say, "I think this is great. I
13 approve it." I certainly wanted and expected anyone who
14 opposed it to file something.

10:39:04 15 So I'm just -- I'm trying to get at what -- if your
16 objection is that your client doesn't think this model, if
17 you pursued it, would provide what your client wants and
18 would ultimately be that a settlement would be approved by
19 the Court of Appeals, all right, but no one's making you do
10:39:22 20 it.

21 Why are you opposing providing the opportunity for
22 some other Defendant who thinks it might be a pretty good
23 model from trying it?

24 MS. WINNER: I think, your Honor, because
10:39:34 25 first of all, as I said, there are only so many resources to

1 go around, including resources of the Court and of the
2 Special Masters that are attempting to assist with the
3 settlement process. Dedicating those resources to this
4 would divert them from other options. That's Number 1.

10:39:51 5 Number 2, we're concerned that this -- I'm going to go
6 further into this in a few minutes. We're concerned that
7 this proposal, as it has been put forward, is going to sow
8 considerable confusion among the proposed class, and in
9 fact, has already started to do that. We've already seen
10:40:11 10 some indication of that.

11 And third of all, we are very concerned that
12 notwithstanding all of the protestations by the Plaintiffs
13 that they -- that this isn't solely for negotiation
14 purposes, there will be no implications of this for any
10:40:27 15 merited class issues, that could very readily be
16 misunderstood, even if your Honor were to adopt their
17 proposal on that, could very readily be misunderstood by
18 other courts.

19 Your Honor, in order to certify this Class, under
10:40:43 20 Supreme Court, very clear Supreme Court law, has to make
21 explicit findings under each of the Rule 23 factors. Those
22 Rule 23 factors, for the reasons we've set out in our brief
23 -- and I'm only going to talk about one or two of them
24 today. I'm not going to belabor it -- but those 23 fact --
10:41:01 25 Rule 23 factors are not satisfied here.

1 The Plaintiffs are asking your Honor to basically shut
2 your eyes and make those findings for purposes of
3 expediency.

4 THE COURT: What -- first of all, you're
10:41:14 5 correct. If there would be a settlement, I would still have
6 to have a fairness hearing and entertain objections and make
7 a decision. And if I adopted it, I would have to go through
8 all those 23, Rule 23 factors and make findings.

9 MS. WINNER: No, you have to make those
10:41:34 10 findings now if you're going to certify this Class. Those
11 findings have to be made now. That's the part.

12 THE COURT: What findings -- what findings do
13 you think I cannot make in good faith now?

14 MS. WINNER: You cannot make in good faith --
10:41:46 15 I mean I think the only findings you can make in good faith,
16 based on what has been presented to you, is numerosity. I
17 think that's satisfied. Everybody agrees on that. But,
18 there are three other factors under Rule 23(a) and there are
19 two factors under Rule 23(b) on which specific findings are
10:42:04 20 required.

21 THE COURT: What findings do you think the
22 facts don't warrant?

23 MS. WINNER: The facts do not warrant -- let
24 me give you a couple of examples.

10:42:15 25 One of the findings that is required under Rule 23(b)

1 is predominance. The Amchem case from the Supreme Court
2 made very clear that you cannot find predominance merely
3 because a settlement would be good for everyone. And so
4 that swamps everything. You have to look at the underlying
10:42:37 5 claims and the proof that would be used to satisfy those
6 claims.

7 And the Supreme Court, by the way, has been very clear
8 in some of its recent decisions. The Amgen case --
9 different from Amchem, the Amgen case, the Tyson Foods case
10:42:55 10 from the Supreme Court, the Supreme Court has said you have
11 to make a rigorous analysis that looks at evidence, that
12 determines will the claims be -- not whether the claims are
13 the same causes of action for everybody, but rather, whether
14 those claims can be proven in one fell swoop with common
10:43:18 15 evidence; whether you can prove the issues with common
16 evidence.

17 THE COURT: Well, I think -- I think that's
18 fairly easy to say. All right? I've studied this, I've
19 studied these -- the complaints. I've been reading a whole
10:43:33 20 lot of motions. Okay? I think Mr. Seeger is essentially
21 right in terms of liability. In terms of liability, I could
22 probably substitute almost any other city or county for
23 Summit and Cuyahoga and the trial would be similar. For
24 damages, there would be -- there would be differences.

10:43:53 25 MS. WINNER: In fact, your Honor, the issues

1 would be quite different, and I was actually going to bring
2 up what he said about that.

3 THE COURT: I think they're a lot more similar
4 than different.

10:44:01 5 MS. WINNER: They're -- particularly if you
6 look at the distributors, if you -- the trial in this, in
7 October, that you have set for this October, is going to
8 look at what was shipped in to Summit and Cuyahoga County,
9 what impact those shipments had, whether those shipments
10:44:19 10 were diverted, what impact those shipments had on the
11 community, if any. And you look at that -- by the way, on a
12 Defendant-by-Defendant basis, this is not a finding that you
13 can make just sort of globally and say well, if you look at
14 all the Defendants together, it sort of looks the same.

10:44:37 15 This finding has to be made individually for every
16 Defendant. You cannot substitute Cumberland County, Maine
17 and prove the case from Cumberland County, Maine, or
18 Phoenix, Arizona, based on what the shipments were in Summit
19 County.

10:44:54 20 The shipments into Summit County, the impact of those
21 shipments on the residents or the community of Summit County
22 has nothing to do with the case of Cumberland County, Maine,
23 or Phoenix, Arizona.

24 THE COURT: Would just be different
10:45:11 25 statistics. All right?

1 MS. WINNER: No, it's going to be more than
2 just statistics because it has to be statistics where they
3 were coming from. They're different distributors in
4 different cases, in different jurisdictions. Some of these
10:45:22 5 jurisdictions, my clients shipped very little into. Some of
6 them they shipped more into. That's true of all the
7 distributors.

8 THE COURT: Let me ask you this. I mean
9 what -- if this model, if you don't think this model passes
10:45:40 10 legal muster, what are you proposing?

11 MS. WINNER: Well, your Honor, I can
12 understand your frustration --

13 THE COURT: No, no. What are you -- what are
14 you -- how do you think this model can be improved Ms.
10:45:55 15 Winner, or if it's so bad that it needs to be scrapped, what
16 are you proposing in its alternative as an alternative?

17 MS. WINNER: Well first of all, your Honor, I
18 can't propose an alternative here today. That's not, I
19 think, what we're here for --

10:46:11 20 THE COURT: I disagree. I disagree.

21 MS. WINNER: -- because your Honor cannot
22 certify a class that does not satisfy Rule 23 merely because
23 there's not a better alternative out there. I mean,
24 unfortunately, that's what the Supreme Court --

10:46:26 25 THE COURT: We may differ on that, Ms. Winner.

1 MS. WINNER: We may but that's what the
2 Supreme Court held in the Amchem case.

3 THE COURT: Amchem, let's see what they do
4 with this if this gets that far.

10:46:37 5 MS. WINNER: The Supreme Court confronting
6 Amchem was confronting similar situations where there was a
7 very --

8 THE COURT: No court has ever confronted a
9 similar situation. That I'm confident of. So you have no
10:46:49 10 idea what -- if this gets to the Supreme Court, you have no
11 idea what they'll do.

12 I'm -- but I -- but I'm not worried about the Supreme
13 Court. The issue is what I will do, and I am open to all
14 suggestions but I would simply say just to say that this
10:47:07 15 model isn't adequate isn't helpful to me and it isn't
16 helpful to the process. What is helpful is if you say, "All
17 right, Judge, you should -- you should make these following
18 changes, A, B, C, or here's a much better model."

19 MS. WINNER: Well, let me say, your Honor, our
10:47:26 20 brief does address several problems with this proposal that
21 are fixable.

22 THE COURT: All right. What do you think
23 needs to be fixed?

24 MS. WINNER: One thing that is -- that would
10:47:37 25 be fixable but is not fixed -- I'm not saying it would cure

1 all the problems, but one is that this is not proposed as a
2 class action. It's not a class proposed to be certified in
3 any particular lawsuit, involving distinct parties with
4 distinct plaintiffs and distinct plaintiffs. That's --

10:47:55

5 THE COURT: I've already said that's -- I've
6 already fixed that. It's going to be a specific number of
7 specific federal claims, and it will be 13 national
8 Defendant families.

10:48:09

9 MS. WINNER: But it has to be in a specific
10 case. It can't just be -- MDL is not a case; it's an
11 administrative mechanism. It's not a case. It's not a
12 case --

13 THE COURT: I got 2000 cases. There has to be
14 a vehicle for resolving them as a group, so.

10:48:23

15 MS. WINNER: But, your Honor, again, I'm not
16 saying that that's not fixable. I'm saying we raised this
17 before and they chose not to fix this.

18 THE COURT: I'm not understanding what you're
19 suggesting should be fixed.

10:48:34

20 MS. WINNER: There is no case in which they
21 are seeking to have this case certified. This motion is
22 filed just generally in the MDL. It's -- they're not
23 seeking certification against specific Defendants. And I
24 understand that your Honor does intend to address that.

10:48:49

25 THE COURT: I'm fixing that. There will be 13

1 Defendant families.

2 MS. WINNER: But, your Honor, we'll need to
3 make the Rule 23 findings for each Defendant. That is,
4 again --

10:48:59 5 THE COURT: If I need to, if you think I
6 can -- I can make findings if I need to.

7 MS. WINNER: But let me talk about another
8 area where there are some clear problems here. And that is
9 the conflict of interest within this class. And I go back
10:49:14 10 to -- and the real problems with the notice.

11 We might return here to the article from Professors
12 McGovern and Rubenstein that was sort of the foundation of
13 this proposal. And that article, if you read it, it's very
14 interesting. They did a lot of work to try to address the
10:49:37 15 adequacy of representation issues in light of Amchem and to
16 come up with a design, particular structure for a proposed
17 Negotiation Class.

18 Now we don't think even that would satisfy Rule 23,
19 but if you leave that issue aside, that -- they at least
10:49:56 20 made -- do make an effort to try to make -- get it as close
21 to Rule 23 as possible. This proposal doesn't follow that
22 pattern. It doesn't do what that -- what the original
23 concept envisioned because the original concept was -- it
24 has two critical parts that are not satisfied here.

10:50:20 25 One is that you get to get -- you identify all the

1 claimants who would need to participate in a settlement in
2 order to get a global settlement, and you make that your
3 class.

4 THE COURT: I thought that's what happened.

10:50:36 5 MS. WINNER: They don't -- well, they don't
6 really do that here because you leave out the states, and
7 that's pretty critical. The states are not part of the
8 Class.

9 THE COURT: Of course, not. They're not -- no
10:50:47 10 state has a federal lawsuit, Ms. Winner. So they can't
11 be -- I mean the State Attorneys General have each decided
12 to file one or more cases --

13 MS. WINNER: I believe Montana has a
14 federal -- I believe Montana actually has a federal suit.

10:51:02 15 THE COURT: I don't think so. Alabama was the
16 only one who did. I'm not aware of any counsel --

17 MR. LYNCH: Your Honor, we just had it
18 stipulated that Montana has filed a federal lawsuit.

19 COUNSEL: No, no, no.

10:51:13 20 THE COURT: No. There is no -- Alabama
21 voluntarily dismissed their federal lawsuit and refiled in
22 State Court. It did not include any State Attorney General.

23 MR. LYNCH: Excuse me for interjecting this.
24 It was Idaho, not Montana.

10:51:30 25 THE COURT: I don't think this is going

1 anywhere.

2 MS. WINNER: Your Honor, let me go to the
3 second piece, which I think is more critical, and I don't
4 think there's any basis for dispute here.

10:51:39 5 The second piece, the critical piece here is that
6 there will be an advance agreement that sets up, upfront
7 what each class member's share of any settlement will be.

8 THE COURT: I think that's probably the best
9 part of the proposal. Why do you think that's bad?

10:51:59 10 MS. WINNER: Because it's not true. They
11 haven't done that. That's the problem. If they'd done, you
12 know, we might be talking differently but that's not what
13 they've done here. That's not what this proposal does.

14 This proposal only provides an allocation that goes to
10:52:14 15 the County level. It provides no allocation between the
16 cities and between the counties and the cities and towns and
17 villages that are within each county. That is left either
18 to later negotiation between each county and its
19 constituents or to the Special Master. If they can't reach
10:52:39 20 agreement with the Special; Master, it will have to be
21 re-litigated.

22 So they have a partial allocation, not a complete
23 allocation. This is kind of hidden in their -- in their
24 filing. But if you read it closely, it becomes very
10:52:53 25 apparent.

1 THE COURT: Well I mean that's --

2 MS. WINNER: That's a very real problem.

3 Let me just give you an example.

4 THE COURT: How is that a problem for you?

10:53:02 5 Again, you don't have to use it. If you've got a better
6 way, I mean.

7 MS. WINNER: It's a problem because it's being
8 held out there as the golden way to solve this. It's being
9 held out there as a way the Court should invest its time and
10:53:21 10 its energy and its resources. It's being held out as
11 something that the Court is being invited to make findings
12 that this record does not support.

13 It is a problem because we have a very, very
14 complicated litigation here. Your Honor has stressed that
10:53:42 15 more than anyone. This is -- this is as complicated a
16 litigation as there's ever been, and adding another layer of
17 complication through a class action that is not supportable,
18 that does not follow the Federal Rules, does not even do
19 what the Plaintiffs claim it does, is wasting everybody's
10:54:06 20 time, is wasting everybody's energy.

21 Let me just give you the example --

22 THE COURT: Ms. Winner, if -- if every
23 Defendant feels the way you do, there will be no time wasted
24 because no one will ever use it.

10:54:23 25 MS. WINNER: But your Honor will have gone on

1 record making findings that are not supported by the record.
2 Your Honor --

3 THE COURT: That's on me but it's going to be
4 academic because no one's ever going to use it.

10:54:34 5 MS. WINNER: It will not be academic if other
6 people copy those findings, your Honor. That is --

7 THE COURT: No one -- I mean copy the
8 finding -- no one can copy the findings in another case.
9 Any other Judge in another case will have to see what's
10:54:48 10 proposed in his or her case.

11 MS. WINNER: We're also concerned that it
12 would create a considerable amount of confusion out there
13 about what the situation is, whether class members are, in
14 fact, entitled to negotiate separately with defendants.
10:55:03 15 That is something that's come up in the submissions that
16 have been presented to your Honor, the written submissions.

17 There's also confusion in the notice, and the -- let
18 me just give you an example from the notice of what the
19 problem is with the notice.

10:55:18 20 The idea is that allocation is made clear. All you
21 have to do, if you're a small town in America, all you have
22 to do is just look up on this website and you'll find out
23 what your allocation is.

24 Well, let's just take the example of DuBois, Wyoming.
10:55:34 25 Very nice little town in Wyoming I visited once. Dubois,

1 Wyoming looks up -- opens up their browser. They look up
2 the website, they look up their county, Fremont County,
3 Wyoming, and see that Fremont County is going to get either
4 the billion-dollar settlement, Fremont County will get about
10:55:52 5 \$68,000, and that DuBois will get \$98 out of that.

6 Well that, in fact, isn't true. If you read the fine
7 print, you find out -- and you actually have to sort through
8 the FAQ's and their brief in support of this motion. You
9 find the fine print, it actually says they're proposing if
10:56:16 10 your allocation is less than \$500, you actually get nothing.

11 So the proposal is actually that out of a
12 billion-dollar settlement, DuBois would get zero. But, this
13 website says they get \$98. But, then there's more on the
14 fine print. The fine print also says well by the way, this
10:56:36 15 is only sort of a default allocation that might be applied
16 because there's no actual agreed allocation for DuBois or
17 for Chicago or for Montgomery, Alabama, or any other city or
18 town in America. There is no specific allocation agreed to
19 here. There's just this default idea of what it might be,
10:56:59 20 but you still have to negotiate it afterwards.

21 That creates two very serious problems here. One is
22 this notice is not adequate. It is, I would argue,
23 affirmatively misleading. I think, you know, DuBois looks
24 this up, they think they're getting \$98. They're not
10:57:19 25 getting \$98. They're not guaranteed --

1 THE COURT: Okay. We'll have to look
2 carefully at the notice --

3 MS. WINNER: There's another problem.

4 THE COURT: -- not that kind of confusion. We
10:57:28 5 can look at that.

6 MS. WINNER: There's another problem here, in
7 that there's conflict of interest within this Class, a very
8 fundamental conflict of interest.

9 THE COURT: What's that?

10:57:37 10 MS. WINNER: Between the cities and the
11 counties.

12 All of these entities have got to be able to negotiate
13 with each other.

14 THE COURT: Well --

10:57:42 15 MS. WINNER: I did note at the beginning that
16 your Honor said --

17 THE COURT: That happens all the time.

18 MS. WINNER: No.

19 The whole idea of this structure, the reason why they
10:57:51 20 try to circumvent other aspects of Rule 23 and say this
21 Negotiation Class idea will work is because this is all set
22 upfront. You don't have to negotiate it after the fact and
23 that would eliminate conflicts within the Class. That's the
24 whole idea of --

10:58:09 25 THE COURT: What are you -- what are you

1 proposing as an alternative, Ms. Winner?

2 MS. WINNER: Your Honor, I think -- I don't
3 have a specific alternative. I think that the -- if you
4 look at the article, that what the article presents, it says
10:58:25 5 that the alternative is you actually have to have an
6 agreement that actually does allocate everything. That --
7 that would be the fix. That was the concept that the
8 Plaintiffs borrowed in coming up with this motion, is that
9 there had to be a full allocation formula for everybody.

10:58:44 10 THE COURT: All right. So --

11 MS. WINNER: Now the other way the Amchem case
12 says that you can address this kind of conflict problem is
13 that you can have subclasses. And the Plaintiffs make
14 their -- I think a very persuasive argument in their
10:59:00 15 motion -- I don't agree with all of their reasons for why
16 subclasses wouldn't work here. It just wouldn't be
17 practical. And frankly, I think the main reason it wouldn't
18 work here is you then have to have rather than one global
19 settlement which, is the whole idea here, you'd have to
10:59:15 20 negotiate a whole bunch of different settlements.

21 THE COURT: Right. It defeats the purpose.

22 MS. WINNER: That defeats the purpose. And
23 that is why the concept that is set out in the article from
24 Professors McGovern and Rubenstein is to have the allocation
10:59:31 25 completely established upfront so that you don't have to

1 worry about subclasses.

2 So, your Honor, I'm not going to go --

3 THE COURT: That would put this off
4 indefinitely for every county to negotiate with every city
10:59:45 5 and township that has filed a lawsuit and everyone that
6 hasn't so -- before we do anything, but I hear what you're
7 saying.

8 MS. WINNER: Your Honor, there are several
9 other fundamental problems with this motion and we do set
11:00:01 10 them out in our brief. I'm not going to recite them. Your
11 Honor has said you've reviewed our brief. And if you have
12 questions, obviously I'm happy to address them. I
13 appreciate your patience with me today.

14 We do have very serious concerns here and we do think
11:00:17 15 that this motion, at least as it's currently framed, should
16 be denied.

17 THE COURT: Okay. Thank you, Ms. Winner. All
18 right.

19 Anyone -- I guess anyone want to speak on behalf of
11:00:31 20 the States?

21 MR. SINGER: Yes, your Honor.

22 Good morning. I'm Paul Singer, the chief attorney of
23 the tax division of the Texas Attorney General's Office.

24 And first, I want to thank you for giving the States
11:00:48 25 another opportunity to address the Court. Despite your

1 repeated recognition that we are not parties or bound by
2 your Honor or the rulings of this Court, obviously the
3 States play a critical role in this process and we are
4 active litigants in this case and also importantly, we are
5 active -- we have engaged in active investigations, using
6 our pre-investigative powers.

7 I just want to lay that out because I think the
8 States, like member of the Plaintiffs Committee, have been
9 very active participants and are very knowledgeable about
10 the facts that are here and before us that have led to this
11 hearing today.

12 And as to the matter at hand, the AG is also an
13 important player when it comes to class action. We have a
14 role under the Class Action Fairness Act to review class
15 action settlement proposals, such as this novel approach,
16 and raise any concerns on behalf of our citizens with the
17 Court.

18 As your Honor knows, 38 AG's submitted a letter to the
19 Court, outlining many of our concerns that we have. I think
20 it's somewhat unprecedented to see that many AGs united in
21 expressing their concerns, especially given the short time
22 that was available to review these motions.

23 But I want to address -- rather than go through the
24 letter, I do want to address a few things that your Honor
25 has raised today and a few points that have been made by the

1 Plaintiffs as well.

2 First, your Honor, I understand and recognize the
3 notion that if parties don't like this model, they just
4 don't have to use it. Unfortunately, I don't think it's as
11:02:30 5 simple as that, and especially when it comes to the States.

6 The motion that's been put out there goes into great
7 detail about the role that it -- that this negotiation class
8 would play in determining allocation between the States and
9 the Counties, including purporting to allow out-of-state
11:02:50 10 representatives ultimately to vote on how that allocation
11 would work within a particular state, and then also
12 subjecting any final allocation that's reached between a
13 state and its counties to ultimate approval by this Court.

14 So that directly conflicts with your Honor's previous
11:03:08 15 orders that make it clear that this Court does not have
16 jurisdiction over the states and it infringes on state
17 sovereignty. That's really the underlying sovereignty issue
18 that the States have raised.

19 I know Professor Issacharoff spoke earlier about
11:03:23 20 States stepping in the shoes of counties. I agree. It's
21 largely a very claim-by-claim issue --

22 THE COURT: I understand your point, but I
23 don't, I don't think this proposal infringes one iota on
24 state sovereignty.

11:03:42 25 Everyone understands that no defendant or group of

1 defendants is going to settle with the States alone and not
2 with the cities and counties, or with the cities and
3 counties alone and not the states. Okay? That would be
4 lunacy, and no one would do it.

11:04:00 5 And so the challenge has been, all right, how to
6 create some -- some semblance of a team on the Plaintiffs'
7 side so any Defendant who wishes to pursue settlement could
8 do it.

9 Now it's easy to set -- establish a team of 50AGs.
11:04:19 10 It's 50 men and women. That kind of team has been put
11 together in lots of other lawsuits very effectively. They
12 were here from the beginning. It's not so easy with 2000
13 litigating cities and counties and potentially 20 or 30,000
14 others. So that, to me, is purpose the of this proposed
11:04:42 15 class. It's so that a Defendant who says I want to settle
16 with everyone now can say all right, I've got the AG's and
17 I've got this litigating subdivision, and I can figure out
18 -- I do one of two things. I decide the allocation. I'm
19 offering X to the states and X to the cities and counties,
11:05:07 20 or I'm offering Y to the two groups and you allocate it.
21 Okay? And you figure it out.

22 So all this mechanism does is take care of the portion
23 that is allocated to the cities and counties. It doesn't
24 say what that portion will be. In fact, it explicitly says
11:05:33 25 it will be the product of negotiation between the states and

1 the cities and counties, which it would have to be. Quite
2 frankly, if it didn't exist you would have to do it. And it
3 doesn't say how you do it. It just says you do it. And it
4 doesn't say if you can't come to an agreement, the Court
11:05:47 5 decides. I don't decide. If you can't come to an
6 agreement, there's no settlement with that Defendant or
7 group of Defendants.

8 So I don't -- I wouldn't approve anything that I
9 thought infringed on state sovereignty.

11:06:02 10 MR. SINGER: So, your Honor, I think the
11 motion, though, purports to do more than just focus on the
12 County allocation.

13 It does include reference to the fact that this
14 mechanism could be used to decide how that allocation occurs
11:06:16 15 between a state and its counties and how the relationship
16 between state and counties goes.

17 THE COURT: I didn't read it. I didn't read
18 it, and I don't think it could. I don't -- I don't -- I
19 don't think that I have the power, directly or indirectly,
11:06:37 20 to make that decision. All right? Either a Defendant wants
21 to settle, either that will be explicit in the settlement
22 agreement, all right, which would be a three-way
23 negotiation, or it would have to be worked out afterward
24 between the states and the cities and counties and it would
11:06:57 25 be a product of negotiation, and no one could dictate it.

1 All right? If I tried, it would be appealed in a minute and
2 reversed without even an argument.

3 So I don't -- I mean can you point to something in
4 this agreement which you think tells a one-state AG or 50 as
11:07:20 5 a group this is how you've got to -- how you've got to
6 allocate your money that's awarded in any settlement? If
7 so, I'll fix it.

8 MR. SINGER: I think in the motion, I mean I'm
9 just referencing on Page 10 of the motion, it does reference
11:07:38 10 that any agreed-to allocation gets treated as a settlement
11 and submitted to the Negotiation Class for consideration.

12 So if in Texas, the AG reaches a separate agreement
13 with its counties, what this motion is purporting to do is
14 then force that agreement to be taken to this Negotiation
11:07:56 15 Class for a vote.

16 And what unclear between the motion and the memorandum
17 is that whether or not this entire National Class gets to
18 then vote on how that allocation works within Texas, for
19 example.

11:08:08 20 THE COURT: Well, it doesn't --

21 MR. SINGER: And, your Honor, I appreciate
22 what you're saying because I mean some of this can be
23 remedied, and which I think is part of the offer that the
24 states have made is to continue to work as we have from day
11:08:22 25 one as this proposal was originally created, we are happy to

1 continue to work with the parties about how alternatives can
2 be approached.

3 THE COURT: And I would simply say,
4 Mr. Singer, you know, picking up on what I said to Ms.
11:08:38 5 Winner, there are other models. No one, no defendant has to
6 use this model. If someone proposes another model that says
7 hypothetically we're going to rely on each State AG to
8 figure out and work it out with the cities and counties in
9 his or her state, all right, but there's still going to have
11:09:02 10 to be a lot of negotiation. And if you don't work it out,
11 there's nothing.

12 So this is a -- I think one of the strengths of this
13 model is the allocation system because it -- a lot of time
14 and effort and money was spent coming up with something that
11:09:20 15 looks fair. It looks like it gets the money to where the
16 harm is, which is the idea, and it gets the money to where
17 the harm is even if a particular subdivision hadn't filed a
18 lawsuit because no one wants to encourage another 20 or
19 30,000 lawsuits.

11:09:38 20 I said from the start, if there's any settlement, the
21 money needs to go where the harm is and where the treatment
22 facilities are. And I think -- I think this does this. So
23 I think it would be -- it would be helpful toward those
24 discussions under some other model, but again, I welcome
11:09:57 25 your offer.

1 And this is a work in progress. And quite frankly, if
2 it's approved and if a given Defendant wants to use it, I am
3 sure that during that process, there will be changes made
4 because people are going to say, "Geez, we didn't anticipate
5 this. And we've got to fix this and we've got to fix that."
6 This is all theoretical. There will be a whole lot -- a lot
7 legislation. All right? You pass it, you think -- you
8 think it works, and then you start trying to implement it
9 and you see there are things you've got to change and you
10 change it. So I expect that to happen here.

11 But, I -- if you think that there's some language
12 which just -- which appears to say that this Court, in any
13 way, shape, or form is going to tell an Attorney General of
14 Texas or any other 49 states what they're to do with money
15 that they are -- they get in a settlement, I want to fix
16 that language because I -- that's -- it's not appropriate
17 for a Federal Court, directly or indirectly, to do that.

18 MR. SINGER: Yes, your Honor.

19 And we can do that. But it's also the issue of how
20 the states interact with their counties and how we are going
21 to go forward within each state and allocate funds to do
22 exactly as your Honor wants because I think we share in that
23 goal, which is getting the money to the appropriate
24 locations where the problem is.

25 And certain states have had advanced discussions with

1 all of their subdivisions and are working that out. Our
2 concern is that by including the states in these motions,
3 which they do, I mean there is reference to the states and
4 how this will impact the state discussions with its
5 counties, it's infringing on that inherent sovereignty that
6 we have to have those -- that relationship with our
7 subdivisions.

8 There's no reason the states need to be at all
9 referenced or included in motions like this because, as your
10 Honor has noted, none of the states have filed cases or have
11 cases before the Court.

12 THE COURT: Well, I think it had, quite
13 frankly, Mr. Singer, it's in there to make it clear that
14 they're not trying to infringe on state sovereignty. If
15 they say nothing, someone's going to -- raise a whole lot of
16 question and say, "Well, what about the states and what
17 about the state cases?" So I think they have to -- they
18 have to mention that or else --

19 MR. SINGER: I want to address that, too, your
20 Honor, because as your Honor knows, the states are active
21 participants in ongoing settlement discussions that have
22 been very active. And frankly, the states are really the
23 leaders in those discussions for good reason because of the
24 nature of our claims and the nature of our offices.

25 And to the question of is there a better alternative,

1 I think the short answer is yes. You know, we are happy to
2 separately and behind closed doors further brief your Honor
3 on sort of the nature of those discussions and what varying
4 models have looked like. But, inherent in just sort of the
5 underlying power that your Honor recognized just a moment
6 ago, the States have to do this time and time again.

7 We are quite familiar with settling multi-state
8 matters and resolving issues at a nationwide level, and I
9 think we should be looked to, to conduct that here.

10 THE COURT: That I was going to raise at the
11 end, but I'll raise it -- I'll point that out now.

12 The problem is that in a number of states, any money
13 that is, that a State Attorney General obtains, either by
14 victory in court, litigated judgment, or settlement, goes
15 into the general fund. And the men and women who control
16 what happens in the general fund are the elected state
17 representatives and senators. That's what they do.

18 And that's what happened in the tobacco litigation.
19 Over \$200 billion, far more than 90 percent of that was used
20 for public purposes totally unrelated to tobacco smoking,
21 lung cancer, whatever. And I believe that's why we have all
22 these counties and cities that filed separate lawsuits, to
23 make sure that doesn't happen again.

24 And so, again, no Defendant has to use this model at
25 all. I know that there, as I alluded to, there are other

1 models being discussed actively, and if a given Defendant or
2 Defendants think that' a better model, more power to them.
3 I'm all in favor of it if it works. And -- but that model
4 has to address -- because the model is encompassing cities
11:15:03 5 and counties, it has to address the problem of putting money
6 into the state general funds or else it isn't going to fly.

7 And so again, this is -- this is a nonexclusive
8 proposal, and it doesn't cut off -- in fact, I think the
9 more models out there, the better. Okay? Because it may be
11:15:27 10 that that given Defendant may say, "Well, I'd like something
11 for Model A and Model B, and this is" -- so whatever.

12 MR. SINGER: Your Honor, to your initial
13 point, and that is a -- the key issue of the model that is
14 under development, ensuring exactly that point. I think the
11:15:47 15 States completely agree with your Honor on -- in terms of
16 again, making sure the money goes to where the problem is in
17 addressing the problem. And so, you know, as I said, I
18 think we're happy -- and it does --

19 THE COURT: As I said, if you -- I mean if you
11:16:03 20 can identify, Mr. Singer, you or your colleagues, language
21 which you feel, you know, expressly infringes on state
22 sovereignty and say somehow this Court, me, directly or
23 indirectly, is telling a state, State AG how to do his or
24 her job or how to -- how to settle a case or not settle a
11:16:31 25 case, or how to in any way, shape, or form allocate money

1 that goes to a state, tell me, I will -- I will -- I'll
2 change that language. Certainly if it says that expressly,
3 it's out. And if it's subject to that interpretation, I'll
4 revise it so it's not subjected to that.

11:16:51 5 MR. SINGER: I appreciate that, your Honor,
6 and I think we're happy to provide some alternative
7 language.

8 THE COURT: All right.

9 MR. SINGER: I would like to raise, though,
11:16:57 10 the fact that yes, more models in general are a good thing,
11 but I do want to underscore the point that was made earlier,
12 that there is going to be a lot of confusion as this process
13 moves forward, especially if there are other models that are
14 far more progressed and more likely to result in settlement
11:17:16 15 than the one under consideration today.

16 When all of our subdivisions receive formal notice of
17 this, there is no doubt that we are going to be overwhelmed
18 with questions and confusion.

19 I strongly do not believe that the comment made
11:17:32 20 earlier, I think by Mr. Seeger, that everybody knows about
21 this and all of our subdivisions are well aware of what's
22 happening, I do not believe that's the case. In Texas alone
23 we have such varied subdivisions. We have counties that
24 have four and a half million people. We have counties that
11:17:47 25 have 130 people. And when you get down to the individual

1 cities and towns, you're talking about a very different
2 level of sophistication and political structure. You have
3 wide variance in how they can even consider these kinds of
4 notices and even raise an objection.

11:18:05 5 And so there's just inherent concern that there's
6 insufficient time and insufficient notice for those
7 subdivisions to properly object.

8 And then as the points have been made earlier, then
9 they're stuck, then they're bound. And while I understand
11:18:19 10 the subdivisions all get a vote later, just a straight
11 up/down vote, what's unclear from the FAQs that's going out
12 to these subdivisions is that it's 75 percent of those
13 voting. That is not made clear in the FAQ. It's not made
14 clear in the motion. It's made clearer in the memo that
11:18:38 15 accompanies it, and that's --

16 THE COURT: Well, that's -- I will look at
17 that because it's -- I think, quite frankly, I think most
18 people would understand that because if it's not, and people
19 don't vote, they're essentially voting no. I mean it's, you
11:18:57 20 know, generally elections are determined by the people who
21 vote. And if you choose not to vote, you can't complain
22 about it.

23 MR. SINGER: Sure. And what's different here
24 is the unique --

11:19:08 25 THE COURT: I'll make sure that the -- it's

1 made clear that it's 75 percent of those voters.

2 MR. SINGER: And, your Honor, we're happy to
3 provide, you know, as we've outlined other concerns in our
4 letter, we're similarly, to what we were talking about,
11:19:22 5 happy to provide alternative language.

6 THE COURT: All right. I would encourage
7 you -- I would encourage you to do that because I don't
8 think any -- any of the drafters and any of the lawyers who
9 are proposing this are -- intended to infringe on state
11:19:42 10 sovereignty. They understand that very well. What the
11 heck, a bunch of them are representing states, so.

12 MR. SINGER: I wasn't going to get into that,
13 your Honor.

14 THE COURT: Well, I've alluded to it. And
11:19:57 15 they were involved in this. So the -- you know, I've said
16 enough on that.

17 MR. SINGER: And I think, you know, as further
18 outlined in our letter, the States share a lot of the Rule
19 23 concerns that have already been raised, and I don't need
11:20:12 20 to readdress them for the Court, but obviously in our role
21 and overseeing the integrity of that process, that's the
22 nature of why we raise those concerns. And really the
23 concerns, not just for this particular case, but the
24 precedent in the future that it sets, and so you know, I --
11:20:30 25 I'm happy to go into more of those, but I think your Honor

1 has reviewed them in our letter and all of the other
2 briefing and understands those concerns as well.

3 THE COURT: All right. Thank you very much,
4 Mr. Singer.

11:20:41 5 MR. SINGER: Thank you.

6 THE COURT: All right.

7 Was there anyone else who has any, I guess, objections
8 that haven't been articulated by the speakers so far?

9 MR. BLANTON: Good morning, your Honor.
11:20:56 10 Jonathan Blanton, Deputy Attorney General for Major
11 Litigation at the Ohio Attorney General's Office. I will do
12 my best to be brief, your Honor.

13 If this were -- we appreciate the work Professor
14 McGovern and Professor Rubenstein put into this. This model
11:21:09 15 would be interesting if it were dealing with a consumer
16 protection matter, if it were dealing with a stockholder
17 matter or property damages. But, this is different. This
18 is a case of public interest and public harm. And the model
19 that's been set forth impinges on the role of the Attorney
11:21:27 20 General.

21 The Attorney General has authority, puts them in a
22 unique position to represent the state as a whole, in the
23 interest of the state as a whole.

24 The Attorney General is best situated to work with the
11:21:39 25 legislature to make sure the money goes where the harm

1 really is.

2 Your Honor, the metrics that have been chosen in this
3 class voting concept clearly disfavor smaller jurisdictions,
4 less popular jurisdictions. The fact that we're talking
11:21:54 5 about gross Morphine milligram equivalence rather than per
6 capita is troubling because in any large political
7 subdivision, as you would expect, there will be a larger
8 stream of legitimate opioids. Same with overdose deaths.
9 Same with opioid dependence.

11:22:11 10 The voting itself, your Honor, by the fact that it is
11 population based and then doubles on that, your Honor, with
12 the fact that it is metric based also, so the higher the
13 metrics score, the greater vote you get, puts a great risk
14 to the rights and interests of the smaller political
11:22:28 15 subdivisions, and that expands globally.

16 Your Honor, the danger -- you're talking about the
17 danger to the Attorneys General and their sovereignty lies
18 in the interest of the individual states. There's no
19 requirement in this plan that there's a threshold of Ohio
11:22:41 20 subdivisions that agree. It's a threshold of harm to Ohio
21 subdivisions that agree. Ohio can be bound by the votes of
22 folks who don't even live here, your Honor. New York, Los
23 Angeles, the double counting of the counties and cities
24 could easily overwhelm our southern part of the state, which
11:22:57 25 has been absolutely drenched and almost irrecoverably

1 damaged by the opioid epidemic.

2 Also, your Honor --

3 THE COURT: Mr. Blanton, what are you
4 proposing as an alternative? All right? I mean I
5 understand that, you know, you can say that, all right,
6 there shouldn't be any of these lawsuits in the first place.
7 It is -- I mean the corollary of what you're saying is the
8 Attorney General represents everyone in Ohio, which he does.
9 And so these cases should all be dismissed.

10 If that -- if that's what you're saying, you should
11 say it overtly that the Court should dismiss -- should have
12 filed, you know, say these cases are not just issuable;
13 cities and counties in Ohio don't have a right to bring
14 them, they should be dismissed.

15 I understand there are some litigation like that in
16 Tennessee. I don't know what the result of that's been, but
17 I think the Attorney General took that position.

18 MR. BLANTON: Your Honor, the danger of the
19 city/county cases and any resolution outside of the state is
20 that assuming there's settlement with just the city/county
21 class, not with an Attorney General, say the State of Ohio
22 doesn't join the settlement --

23 THE COURT: There won't be. No state --
24 sorry. No Defendant in his, in its right mind would settle
25 the constellation of cases filed by the cities and counties

1 and not cases filed by Attorneys General. The whole point
2 is that they need -- every Defendant has made clear that
3 before they'll seriously discuss settlement, they'll need
4 some vehicle to provide global peace. All right?

11:24:37 5 It's easy to negotiate with the 50 AG's. It's a model
6 that's done in countless other cases.

7 MR. BLANTON: It's somewhat monolithic, your
8 Honor. But there are outliers --

9 THE COURT: I didn't say it's monolithic. I
11:24:47 10 said if you've got 50 people, 50 men and women, you can
11 actually have them all there together if you want.

12 MR. BLANTON: If the Class gets out ahead,
13 your Honor. The argument is that any recovery received by
14 the City and County, we offer as offset against the state
11:25:01 15 damages --

16 THE COURT: No one is going to settle
17 piecemeal, okay? So it isn't going to happen. Any
18 settlement is going to be with the Attorneys General and
19 with the cities and counties. Okay? So this -- this
11:25:17 20 vehicle is a way of getting a handle around this numerous
21 and somewhat fractious group so no one is going to -- no
22 one's going to settle with this group alone without the
23 AG's.

24 MR. BLANTON: We appreciate that commitment on
11:25:36 25 behalf of the Court, on behalf of the Special Masters, your

1 Honor.

2 As Mr. Singer hinted to, there are other potential
3 models being discussed and proposed that would not encompass
4 these types of challenges, that would not create the risk,
11:25:50 5 not create risk to our community, the risk of Ohio being
6 overwhelmed by other states' votes because of greater
7 populations, that would allow for greater cooperation and a
8 greater state-by-state consideration of the authorities, the
9 needs and the powers existing within that state at that
11:26:08 10 time. We would be happy to talk to you about that. Again,
11 this isn't quite the right forum because they are
12 confidential discussions.

13 THE COURT: Right, but again, again, and I'll
14 say it again, I'm aware that there are other models under
11:26:19 15 discussion. And if a Defendant or group of Defendants
16 believes there's another model that is more effective, and
17 the overall aggregate amount is acceptable, it's going to
18 fly, and it will work. And the cities and counties will
19 join. And if you have some other, you know, other vehicle,
11:26:49 20 again there's going to have to be a vehicle, a process of
21 allocating the money that's acceptable or they won't buy
22 into it. But if you've got a better one, that's fine.
23 Nothing, nothing prevents that from happening.

24 MR. BLANTON: I understand that, your Honor,
11:27:03 25 but once this model is created, once the pressure begins

1 from -- there's a large group of cities and counties who
2 have bonded together in a national class style, that would
3 result in -- essentially crams down these Defendants where
4 there will not be a settlement offered to them, does not
5 incorporate this class structure and, therefore, it gets
6 into the same issues with the states, your Honor.

7 THE COURT: I assume -- nothing is being
8 crammed down -- this is a -- this is a model. There's
9 another model under discussion. No Defendant has to choose
10 any model. It can go to trial in October and go to trial
11 for the next umpteen years in the 22,000 cases around the
12 country.

13 MR. BLANTON: Your Honor, this model creates a
14 known for those who represents the cities and counties,
15 creates a known pot of dollars, a known percentage; 10
16 percent plus the 15 that's allocated. I know there's a
17 waterfall provision. But once that's established, what
18 interest would any of these plaintiffs have, especially when
19 you can roll in the unrepresented unvoting members of the
20 political subdivisions with negotiation of any of these
21 Defendants? Why would they want to do that, your Honor?

22 It creates a system where this becomes the only
23 acceptable model to the subdivisions because it's their
24 benefit for it to be that way, whether it's the benefit of
25 each individual state, each individual community or not, it

1 stops being the question --

2 THE COURT: I disagree. They're represented
3 by lawyers. The lawyers are negotiating with any Defendant
4 who wants to negotiate. They're never going to say no.
11:28:37 5 They're never going to say no, we won't consider another
6 model. In fact, they're duty bound, they're ethically bound
7 representing their clients to consider any reasonable model.
8 All right? They can't say we're not going to consider any
9 model other than this ethically.

11:28:53 10 And if they started to, I wouldn't let them. I'd
11 throw them off the MDL in a heart beat.

12 MR. BLANTON: Thank you, your Honor.

13 THE COURT: So I -- and again, I would echo if
14 you feel, Mr. Blanton, that there is language in here that
11:29:15 15 that interferes with state sovereignty or says or suggests
16 that this Court in some way is going to tell an Attorney
17 General how to allocate money that is -- that is given to
18 the state, I want you to promptly tell me that, show me that
19 and I will look very hard, and if I think you're right, I'll
11:29:39 20 change it, I'll fix it because that's not -- I don't think
21 it's the intention of the movants, but maybe there's some
22 ambiguity. But, get that to me, any suggestions as soon as
23 possible.

24 MR. BLANTON: Thank you, your Honor, for your
11:29:56 25 time.

1 MS. ANDERSON: Good morning, your Honor.
2 Jenny Lee Anderson on behalf of the City of Fargo, North
3 Dakota.

4 As I mentioned in our papers, for a variety of
11:30:12 5 reasons, practical and logistical, the City of Fargo was
6 unable to get its complaint on file by June 14th. That puts
7 it in a non-litigating class.

8 Now, on one hand, the City, therefore, became
9 concerned about being in a less concentrated group and
11:30:30 10 representation of that group. On the other hand, the City
11 of Fargo generally supports the motion and understands
12 proposed class counsel needs to have a definite closure date
13 for litigating and non-litigating classes. So we understand
14 those tensions.

11:30:46 15 Just this morning, I had an opportunity to discuss the
16 issue very briefly with Professor McGovern and also with
17 some members of leadership, Elizabeth Cabraser and others,
18 and it was suggested that perhaps we could explore
19 harnessing the City of Fargo's enthusiasm and desire to roll
11:31:04 20 up its sleeve in event of either litigation or global
21 settlement to act as a representative of some type for the
22 non-litigating class members under the currently proposed
23 settlement class structure if approved by your Honor.

24 Now as I mentioned, this was only discussed as an idea
11:31:21 25 this morning. So the City of Fargo would like the

1 opportunity to explore the idea further with Plaintiffs
2 leadership and with Special Master McGovern and report back
3 to the Court promptly.

4 THE COURT: Okay. Thank you.

11:31:34 5 When did Fargo file its case?

6 MS. ANDERSON: On July 9th.

7 THE COURT: Okay. All right. There obviously
8 needs to be some cut off. And any cut off is going to be
9 somewhat arbitrary, but if not, no one will know who -- who
11:31:53 10 is litigating and who's non-litigating. Okay.

11 Thank you very much for that offer.

12 MS. ANDERSON: Thank you, your Honor.

13 MR. CHEFFO: Your Honor, Mark Cheffo. I just
14 have one --

11:32:06 15 THE COURT: Yes, Mr. Cheffo.

16 MR. CHEFFO: -- thank you, your Honor. One
17 very discreet point.

18 As you know, the Manufacture Defendants have not
19 opposed at all. But, hearing a number of things that your
11:32:16 20 Honor has said today, I think we will digest. One in
21 particular, you referenced both the 13 groups and also
22 referenced you don't plan to focus on certain claims, I
23 think you were focusing on federal claims, and I guess this
24 is really more of an observation in kind of your invitation
11:32:32 25 to invite, you know, discourse about it.

1 The only thing that came to my mind and I think a few
2 of the folks who are kind of sitting next to me here was how
3 that might have -- how, to the extent this was used, any
4 releases would work if --

11:32:50 5 THE COURT: Well, releases would encompass any
6 and all claims. I've -- I've raised that already. I picked
7 that up in my reading of this.

8 The releases, I mean the releases can be broader. And
9 any obviously any Defendant who settles or wants release of
11:33:06 10 any and all claims that were brought and candidly could be
11 brought, you always have language there, too, so that isn't
12 going to be a problem, but I felt it was -- that -- there
13 had to be some boundaries so that -- so the Class members
14 would know what exactly these cases are and there's -- there
11:33:32 15 needed to be some uniformity and you can have uniformity
16 with federal claims.

17 So any releases will encompass any and all claims that
18 were brought or could be brought.

19 MR. CHEFFO: Thank you, your Honor.

11:33:47 20 THE COURT: Thank you for highlighting that.
21 Okay.

22 Anyone else who wanted to weigh in? All right. Well,
23 I very much appreciate first the hard work of all the
24 lawyers, academicians who helped create this proposed
11:34:09 25 negotiation.

1 MR. ISSACHAROFF: Your Honor, could we address
2 two short points that were raised that may help clarify
3 things for the Court? You want to go first?

4 MR. SEEGER: Your Honor, I had a couple of
11:34:22 5 quick observations which I think are important to bring out.

6 On the AG's point, and I think you made the point but
7 if you didn't, I'd like to just -- there are -- I don't
8 represent AG's, your Honor. I represent cities and
9 counties, and I can tell you --

11:34:34 10 THE COURT: If you didn't, you wouldn't be
11 arguing.

12 MR. SEEGER: I wouldn't be at this table.

13 There are cities and counties in Ohio that strongly
14 disagree with the idea that the Ohio AG owns those claims.
11:34:45 15 I think the best evidence of the fact that there's a
16 disagreement is you've got a couple trials about to go and
17 nobody, as far as I know, has come into the courtroom and
18 said stop. So that's just an observation I'd like to make
19 on behalf of the Class here.

11:34:58 20 And I just want to express gratitude to Ms. Winner for
21 looking after our Plaintiffs. It kind of reminds me of the
22 phrase in the Eggleston case in the Seventh Circuit, "That's
23 kind of an issue of the fox expressing worry about the
24 safety of the henhouse." But I wanted to thank her for
11:35:10 25 that.

1 Your Honor, I have nothing else.

2 MR. ISSACHAROFF: Two quick points, your
3 Honor, just to clarify some statements that were made. One
4 was on the voting, voting system.

11:35:18 5 The voting system needs a requirement of 75 percent of
6 each of the six voting trusts. It's not three out of six,
7 four out of six. It's six out of six. And they're designed
8 to, in one instance, overrepresent the power of small
9 jurisdictions because it's by each entity gets one vote. In
11:35:41 10 some instances, it gives more power to the larger
11 jurisdictions because it's by population. And in one
12 instance, it's by impact because it's based upon the same
13 formula that's used in the -- in the allocation system.

14 And so we tried three different metrics before and
11:35:57 15 after the cut off date, and so there's no risk at all of a
16 cram down. And the only system -- the only time this would
17 be called into question is if some Defendant wanted to
18 settle, and as part of the settlement, wanted to give X
19 amount, a billion dollars let's say, to the cities and
11:36:15 20 counties, this then is the voting mechanism for that part of
21 the settlement and it's the allocation for whatever portion
22 is designated to the cities and counties. There is no
23 effort made whatsoever to get inside the State/County
24 relations.

11:36:31 25 The second point is on the allocation itself. We are

1 -- Ms. Winner discovered through her diligence that how this
2 money is distributed to the cities is not present here. Let
3 me read the first sentence where we introduce the allocation
4 model.

11:36:47 5 The allocation model uses three factors to determine
6 the share of the global settlement that each county will
7 receive. We do not purport anywhere to take this down below
8 the county level because as Mr. Singer expressed from Texas,
9 there is a huge variety in the size of counties and in the
11:37:07 10 functions that counties play, vis-a-vis, the various
11 municipalities within them.

12 I used to live in Texas. And there, the counties are
13 very big and incorporate many cities. I now live in New
14 York. We have five counties but one city.

11:37:23 15 So it is -- this cannot be a "one size fits all." And
16 so we are distributing down to the county level. And then
17 there are suggested ways because there's a different
18 distribution of resources and services provided between
19 cities and counties.

11:37:38 20 This is known, and this has been communicated to the
21 2000 plus that already has cases on file. And in addition,
22 we have a website where this is active and has been down --
23 has been hit many, many times by Class members.

24 So yes, we have not given notice yet but this is no
11:37:59 25 secret to the most actively involved litigating entities.

1 And as I said very, very beginning, there is no opposition
2 from within the Class. So the smaller towns of Wyoming will
3 have to get the money from their counties which is the way
4 they get things now.

11:38:19 5 Thank you very much, your Honor.

6 THE COURT: All right. Thank you, Professor
7 Issacharoff.

8 Anyone else? I don't want to slight anyone. All
9 right.

11:38:34 10 Well, I -- I again appreciate all the hard work of
11 those who helped develop and devise and refine this
12 proposal. I appreciate the many people who weighed in with
13 comments or suggestions to improve the finding. I
14 appreciate all the comments made today. The Court will take
11:38:55 15 it under advisement and I'll make a decision in the near
16 future.

17 I just want to highlight some of the key factors that
18 I'm weighing, wrestling in my mind.

19 There needs to be some vehicle to provide resolution
11:39:23 20 of these cases. Everyone knows that trying probably 2500
21 now between the federal ones and the ones in State Court, is
22 -- first, it would sink the state and federal judiciaries,
23 but also the amount of private resources would be
24 staggering. And no one -- no one would want to do that.

11:39:53 25 So there has to be a vehicle to resolve them. There

1 doesn't have to be one vehicle alone. So I've -- I've
2 encouraged all settlement discussions, I've encouraged all
3 ideas, I'm continuing to do so. And this is just one. And
4 no one had to use it. And no one has to use all of it.
11:40:15 5 Someone could use part of it or use it as a spring board.
6 And I think it's a product of the Defendants' justifiable
7 insistence that before they would engage in serious
8 settlement discussions, they needed to have a vehicle, a
9 mechanism to provide a reasonable chance of global
11:40:38 10 resolution and global peace. That's -- that's always
11 expressed by virtually every Defendant I've encountered in
12 my years as a lawyer and now as a Judge. It's a fair and
13 acceptable one.

14 It's a lot more complicated. We've never had, I don't
11:40:54 15 believe in our country, a constellation of cases like we
16 have in this opioid MDL. I believe it's a, you know, a
17 product of some things that have happened in the past, but
18 whether it is or not, we have it here and there has to be
19 some vehicle to resolve these lawsuits.

11:41:21 20 I think this vehicle has some merit. Is it perfect?
21 No. Does it have problems? No. Is it certain it would be
22 affirmed on appeal if challenged? Of course not because
23 it's never been tried before. And that's simply -- but that
24 isn't -- that isn't a reason to say no, because you've never
11:41:37 25 had a set of lawsuits like this. So the vehicle isn't going

1 to be one that's been tried and tested.

2 I don't believe that the proposed Negotiation Class
3 interferes or infringes on state sovereignty but again I've
4 invited the Attorneys General promptly to point out to me
11:42:03 5 any language which says to the contrary, and I will -- I
6 will address it.

7 But again, there's nothing coercive about this
8 process. No Defendant has to employ it. There's nothing
9 exclusive. It does not prohibit any Defendant or State
11:42:22 10 Attorney General from taking a lead in some other vehicle
11 and/or structure. And of course, there's nothing intrusive.
12 No Defendant has to settle at all.

13 So those are the considerations. But I will -- I will
14 weigh all the comments and all the objections that were
11:42:47 15 filed, and I will endeavor to come to a decision as quickly
16 as possible.

17 And again, I think this hearing highlights the
18 challenges and difficulties presented by this MDL. I mean
19 if someone says why is the federal judiciary trying to
11:43:13 20 address a 20-year social epidemic, why is it in this branch
21 of government and not the other two, I might share that
22 question, but we didn't choose it. These cases came to our
23 branch, and we're not shirking our responsibility. And I
24 was asked to undertake it on behalf of our branch. I'm
11:43:37 25 essentially the fiduciary. These aren't my cases. Only a

1 handful of these cases are actually my cases or my court's
2 cases in the Northern District, a fraction of the 2000. I
3 haven't added it up but it's a tiny fraction.

4 I'm the fiduciary, the trustee for -- almost every one
5 of my colleagues in the Federal Court has at least one of
6 these. I haven't looked, but certainly a majority has at
7 least one. And I've been asked to be the steward.

8 I'm trying the case in my district. But, again, the
9 fact is that there has to be some vehicle to address these.
10 And, of course, the cases are -- have highlighted this
11 social epidemic and the social problem.

12 And I've also tried, along with this, to focus on
13 changes in conduct and behavior to turn that curve down and
14 candidly, a number of things have already been put into
15 place. And as part of the discussions that are ongoing,
16 there are a number of other ideas and suggestions.

17 So again, those can't be implemented. Most of them
18 can't be implemented outside of a -- outside of a resolution
19 or a settlement. And that's why it's paramount to have at
20 least one vehicle or two vehicles or three vehicles for
21 resolution.

22 So with that, I want to thank everyone for their
23 participation. And this hearing is adjourned.

24 COUNSEL: Thank you.

11:45:14 25 (Proceedings adjourned at 11:45 a.m.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I certify that the foregoing is a correct
transcript from the record of proceedings in the
above-entitled matter.

s/Shirle Perkins
Shirle M. Perkins, RDR, CRR
U.S. District Court - Room 7-189
801 West Superior Avenue
Cleveland, Ohio 44113
(216) 357-7106